

CalHR Case Number 16-H-0109
Appeal of Transfer
Final Decision Adopted 5/24/2017
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 9:00 a.m. on February 8, 2017 in Sacramento, California.

The appellant, was present and represented by Wendy M. Looney, Labor Relations Representative, Association of California State Supervisors. Scott Merrill, Staff Attorney, Office of the State Controller, represented the Board of State and Community Corrections (BSCC), respondent.

I

JURISDICTION

California Government Code sections 19994.1 and 19994.3 authorize CalHR to return an employee to her former position if an involuntary transfer failed to follow the statutory requirements of Government Code section 19994.1; or was the result of harassment or discipline in violation of Government Code section 19994.3.

On October 28, 2016, respondent, BSCC, issued the appellant an email entitled, "Follow up to Oct. 28 meeting about new assignment." Appellant filed an appeal with CalHR from involuntary transfer on November 25, 2016. The appeal complies with the procedural requirements of Government Code sections 19994.1 and 19994.3. CalHR has jurisdiction over the appeal.

II

ISSUES

The appellant argues her transfer was for the purpose of harassment or discipline under Government Code section 19994.3. The respondent claims an appointing power may transfer an employee under Government Code section 19994.1, and did not transfer the appellant for the purpose of harassment or discipline.

The issues to be determined are:

1. Was the involuntary transfer of appellant lawful under Government Code section 19994.1?
2. Was the involuntary transfer of appellant made for the purpose of harassment or discipline in violation of Government Code section 19994.3?

III

FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The appellant began her career with the State of California on January 1, 2001 with the Office of Criminal Justice Planning. On March 15, 2010, she was appointed to the classification of Field Representative for respondent, Board of State and Community Corrections (BSCC). BSCC is an independent statutory agency established to provide leadership to the adult and juvenile criminal justice systems which functions as an information clearinghouse providing technical assistance on corrections issues.

As a Field Representative, typical tasks for the appellant include developing, revising and promulgating for adoption minimum standards for local corrections in critical areas. These critical areas include, training programs, local jail construction, selection and training of personnel and health and sanitation conditions. The Field Representative classification may also mediate disputes concerning local, state and national standards and court decisions as they impact local corrections.

The appellant served respondent as its federal DMC Coordinator for 12 years. DMC refers to Disproportionate Minority Contact, also known as Racial Ethnic Disparity (R.E.D.). The appellant explained the DMC Coordinator designation provides standing to an individual in each of the 50 states to discuss R.E.D. issues and believes without the DMC Coordinator federal title, discussions with corrections officials would be challenging.

As DMC Coordinator, the appellant would liaise with federal government offices of juvenile justice and provide leadership to respondent's Executive Steering Committee. She was also responsible for overseeing the work of respondent's R.E.D. subcommittee which made grant recommendations to its 13-member BSCC Board. These federal grants include "implicit bias" and "understanding disparities" training and are administered by respondent on a 4-year cycle. The appellant never had authority to make a grant as the Board has approval authority.

In October 2013, the respondent hired a new Executive Director. As she had done years earlier, the appellant disclosed to the Executive Director she was in a personal relationship with a recipient of federal grant money administered by respondent and a subject matter expert in "implicit bias training."

In January 2015, in order to avoid the perception of any conflict of interest, a "firewall" was created between the appellant and the grant-making process. The respondent removed the appellant from her position in its Corrections Program and Planning (CPP) Division which administers grants, to the Facilities Standards & Operations Division (FSO) which conducts biennial inspections and compliance monitoring of adult and juvenile detention facilities. The appellant continued as respondent's federal DMC Coordinator and subject matter expert. The "firewall" was to prevent her work on grant administration.

On June 28, 2016, the appellant was provided a Corrective Action Memo (CAM) by her supervisor FSO Deputy Director. The CAM detailed an incident which occurred on May 31, 2016 and involved the use of profanity. It was investigated by the Deputy Director. The Executive Director admitted other employees in the office use profanity and not all employees receive written discipline. The appellant responded to the CAM asserting the investigation which lead to the CAM was unfair, biased and inaccurate.

An email sent by the appellant to CPP Division staff on September 15, 2016 was interpreted by the Executive Director as a breach of the "firewall." On October 19, 2016, the appellant's supervisor sent the appellant an email. The email stated:

"(Appellant):

To follow up on your question about the status of the 2014-2018 R.E.D. Grants/RFA: I understood from our conversation that you were working on or providing input into the content of the RFA for Year 3 of the grant cycle. I am reminding you of the current firewall between you and R.E.D. grant activities. You have previously been directed by BSCC Management that you are not to work on anything related to the funding of R.E.D. Grants as you have a conflict of interest due to your financial interest in prior awards and potential for future awards due to your relationship with a recipient of the R.E.D. grant funds as a provider of R.E.D. Training.

I am further reiterating the current directive that you are not to work on any products related to the award of R.E.D. Grant funding. This includes inquiring into the status of the grants with other BSCC staff or the local recipients of current R.E.D. funding. Failing to adhere to these directives may result in disciplinary action.

(Supervisor)”

On October 24, 2016, the appellant advised the Executive Director via email, “[s]ince you have escalated this matter to a threat of disciplinary action I am requesting advance notice for the meeting so I can arrange for a witness.” She responded, “Yes, I will give you at least a day’s notice for this meeting.” The meeting was scheduled for Friday, October 28, 2016.

After the October 28, 2016 meeting, the Executive Director sent the appellant a 2-page email outlining a change in her work assignment. The appellant believes accusing her of a breach of the “firewall” and stating she had a fiscal interest in the outcome of the grants is damaging to her reputation, and disciplinary. The October 28, 2016 email removed the appellant from “all RED work on behalf of the BSCC including Title II, the RED subcommittee, DMC Coordinator, compliance monitoring and the Capstone Project.”

The October 28, 2016 email also stated, “[a]gain, your change in assignment is not punitive and is not an adverse action. It is imperative that for your protection and the protection of the agency that we ensure that there is no possibility of a conflict of interest.” Appellant’s supervisor now has the role of DMC Coordinator responsible for compliance monitoring.

The appellant believes she has been relegated to a clerical duty classification because she does clerical work instead of monitoring and compliance. Her new assignment included developing content for a juvenile justice related page to the BSCC Web site and working on the juvenile regulations revision. The appellant’s classification, pay, and work location did not change.

IV ANALYSIS

The appellant believes she was transferred. “[E]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that [she] is asserting.” (Evid. Code, § 500.) The appellant has the burden to prove she was unlawfully transferred by the respondent. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

Appellant was not unlawfully transferred under Government Code section 19994.1 (a).

“An appointing power may transfer any employee under its jurisdiction: (1) to another position in the same class; or (2) from one location to another whether in the same position, or in a different position as specified in (1) or in Section 19050.5.” (Gov. Code, § 19994.1 (a).) Government Code section 19050.5 states, “[n]otwithstanding Section 3517.6, an appointing power may transfer any employee under his or her jurisdiction to another position in a different class pursuant to board rule.”

Although the appellant received a new assignment with new responsibilities, she was not transferred. Her classification, pay and work location did not change. The Executive Director of BSSC, testified the new assignment was for her “protection and the protection of the agency that we ensure that there is no possibility of a conflict of interest.” The appellant did not meet her burden of proof she was unlawfully transferred under Government Code section 19994.1.

Appellant was not unlawfully transferred under Government Code section 19994.3.

Government Code section 19994.3 prohibits transfers “made for the purpose of harassing or disciplining the employee.” CalHR has the authority to revoke a transfer and restore an employee to her original position if it finds the transfer was made for the purpose of harassing or disciplining the employee. The use of the disjunctive “or” indicates legislative intent to prohibit transfer for either harassment or discipline.

Harassment is a “course of conduct directed at a specific person that causes substantial emotional distress in such person and; serves no legitimate purpose.” (18 U.S.C.A., § 1514 (d)(1)(B)(i)(ii).) Discipline is defined as correction, chastisement, punishment, penalty.” (See Black’s Law Dict. (6th ed. 1990) p. 464, col. 1.) A transfer is

disciplinary in nature only if imposed for purposes of punishment. (*White v. County of Sacramento* (1982) 31 Cal.3d 676.)

As noted above, the appellant was not transferred. The actions taken by the respondent were nothing more than a change of duty assignment. Moreover, the appellant's argument the actions taken by respondent were punitive is not supported by the evidence. Although the appellant was no longer respondent's designated DMC Coordinator, the designation is not part of the State Personnel Board (SPB) Field Representative classification.

The SPB classification of a Field Representative is quite broad. It includes mediation, promulgating regulations and critical areas like, training programs, local jail construction, selection and training of personnel and health and sanitation conditions. The appellant's new assignment of developing content for a juvenile justice related page to the BSCC Web site falls squarely within the typical tasks of a Field Representative. Therefore, the appellant was not transferred; she was merely provided a new work assignment with different duties. The appellant failed to show her new assignment was a transfer within the meaning of Government Code section 19050.5 or that the new assignment was motivated by an illegitimate purpose.

V

CONCLUSIONS OF LAW

Appellant failed to prove she was unlawfully transferred under Government Code section 19994.1. Appellant failed to prove her involuntary transfer of October 28, 2016 was for the purpose of harassment or discipline.

* * * * *

THEREFORE, IT IS DETERMINED, the appeal of transfer effective October 28, 2016 is hereby denied.